IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SEPRACOR, INC.,	)	
	)	
Plaintiff,	)	
Counterclaim-Defendant,	)	C.A. No. 06-113-***(MPT)
	)	C.A. No. 06-604-***(MPT)
v.	)	(Consolidated)
	)	
DEY, L.P. and DEY, INC.,	)	
	)	
Defendants,	)	
Counterclaim Plaintiffs.	)	

DEFENDANTS' OBJECTIONS AND RESPONSES
TO SEPRACOR'S NOTICES OF RULE 30(b)(6) DEPOSITION

Defendants Dey, L.P., and Dey, Inc. (collectively "Dey") hereby make the following consolidated objections to the Notices of Rule 30(b)(6) Deposition ("Notice of Deposition") topics served by Sepracor, Inc. ("Sepracor") on April 3, 2007, and noticed for 9:00 am on April 26, 2007 at the offices of Buchanan Ingersoll & Rooney PC, 1737 King Street, Suite 500, Alexandria VA 22314.

GENERAL OBJECTIONS

Dey makes the following General Objections to the topics of examination set forth in Exhibit A to the Notice Deposition:

1. Dey objects to each and every topic of examination to the extent that it seeks to impose requirements or obligations on Dey in addition to or different from those imposed by the Federal Rules of Civil Procedure and/or the Local Civil Rules for the District of Delaware.

2. Dey objects to each and every topic of examination to the extent that it calls for testimony that is protected from discovery by the attorney-client privilege, the work product doctrine and/or any other applicable privilege or immunity. Nothing contained in these objections is intended to be, or in any way constitutes, a waiver of any such applicable privilege or immunity.

3. Dey objects to Sepracor's use of undefined terms that are subject to multiple interpretations, thus rendering a topic vague and ambiguous. Dey's responses will be based on its interpretation of undefined terms, which may be inconsistent with Sepracor's interpretation.

4. Dey objects to any topic calling for information that concerns the exploratory efforts of Dey's counsel in investigating the issues in this case and preparing this case for trial. *See Mass. v. First Nat'l Supermarkets, Inc.*, 112 F.R.D. 149, 153 (D. Mass. 1986); *Besly-Welles Corp. v. Balax, Inc.*, 43 F.R.D. 368, 370-71 (E.D. Wis. 1968). Such topics would tend to reveal counsel's mental impressions, conclusions, opinions, or legal theories. Consequently, such materials are beyond the ambit of discovery. *See* Fed. R. Civ. P. 26(b)(3).

5. Dey objects to any topic to the extent it seeks the identification of "all" facts, factual bases, legal bases, or communications since such an interrogatory is overly broad, unduly burdensome, and oppressive.

6. Dey objects to the April 26, 2007 date as unduly burdensome. Dey will work with Sepracor to arrive at a mutually agreeable date.

7. Dey objects to the noticed location. Dey will make designated witnesses available in Napa California.

SPECIFIC OBJECTIONS

Topic of Examination No. 1

All facts and circumstances upon which Dey, Inc. (hereinafter "Dey") intends to rely to support any contention that Dey has not infringed, and will not infringe (directly, indirectly, contributorily, and/or by inducement) any claim of U.S. Patent Nos. 5,362,755, 5,547,994, 5,760,090, 5,844,002, and 6,083,993 (hereafter the " '755, '994, '090, '002, and '993 patents.)

Response to Topic of Examination No. 1

See the General Objections. Dey also objects to this topic of examination as duplicative of Sepracor's other discovery requests. (*See, e.g.,* Sepracor's Interrogatory Nos. 1, 2, 6 and 7).

Dey objects on the basis that this topic of examination improperly seeks to elicit legal conclusions, legal theories, or legal defenses, or otherwise confidential information protected by the attorney work product doctrine, or attorney-client privilege. See, e.g., *JPMorgan Chase Bank ex rel. Mahonia Ltd. v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 363 (S.D.N.Y. 2002)(denying plaintiff's request to compel 30(b)(6) responses and holding that its requests for 'facts' were a guise for requesting "mental impressions, conclusions, opinions, and legal theory," which as classic work product, is shielded from discovery under Fed. R. Civ. P 26(b)(3)); S.E.C. v. Buntrock, 2004 WL 1470278 at *3 (N.D. Ill. 2004)(holding that the magistrate was correct in finding that what the 30(b)(6) deposition sought "as 'facts' are not merely facts at all, but legal theories and explanation of those theories" and quashing 30(b)(6) deposition). Dey also further objects to this topic of examination as improperly addressed to deposition rather than to interrogatory form because contention depositions are not permitted in the District of Delaware.

> It has been the consistent position of this Court that a lay person shouldn't be required to formulate a party's contention in response to deposition questioning and that not even a lawyer should be required to formulate trial strategy and contentions in immediate response to questions on deposition. And it has accordingly been the consistent practice to require that contention discovery, which is clearly permissible and very constructive in narrowing the issues, but to confine it to interrogatories to a party, period.

Tiegel Manufacturing Co. v. Globe-Union, Inc., C.A. No. 84-483 (D. Del. 1984), Hearing Transcript at p. 14. (attached as Exhibit A.) See, also, *S.E.C. v. Rosenfeld*, 1997 U.S. Dist. LEXIS 13996 at *6 (S.D.N.Y. 1997) (granting motion for protective order where subject matter of 30(b)(6) deposition "would include disclosure of [] legal and factual theories . . . and other matters constituting attorney work product" and where defendant had shown no reason not to utilize interrogatories appropriate to the stage of discovery).

Dey objects to this topic insofar as it requires expert testimony. Dey further objects to this topic as premature inasmuch as the Court has not construed the meaning of any claim language. Dey also objects to this topic insofar as it calls for Dey to furnish evidence on matters Sepracor must prove to prevail at trial, and thus seeks to shift the burden of proof from Sepracor to Dey.

For the foregoing reasons, Dey will not produce a 30(b)(6) deposition witness in response to this topic.

Topic of Examination No. 2

All facts and circumstances upon which Dey intends to rely to support any contention that the claims of the '755, '994, '090, '002, and '993 patents are so limited that no claim can be construed as covering any activity for which the levalbuterol inhalation products of ANDA Nos. 77-800 and 78-309 will be used.

Response to Topic of Examination No. 2

See the General Objections. Dey also objects to this topic of examination as duplicative of Sepracor's other discovery requests. (*See, e.g.*, Sepracor's Interrogatory Nos. 1, 2, 6 and 7).

Dey objects on the basis that this topic of examination improperly seeks to elicit legal conclusions, legal theories, or legal defenses, or otherwise confidential information protected by the doctrine of attorney work product, or attorney-client privilege. *See, e.g., JPMorgan Chase Bank ex rel. Mahonia Ltd. v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 363 (S.D.N.Y.

2002)(denying plaintiff's request to compel 30(b)(6) responses and holding that its requests for 'facts' were a guise for requesting "mental impressions, conclusions, opinions, and legal theory," which as classic work product, is shielded from discovery under Fed. R. Civ. P 26(b)(3)); *S.E.C. v. Buntrock*, 2004 WL 1470278 at *3 (N.D. Ill. 2004)(holding that the magistrate was correct in finding that what the 30(b)(6) deposition sought "as 'facts' are not merely facts at all, but legal theories and explanation of those theories" and quashing 30(b)(6) deposition). Dey also objects to this topic of examination as improperly addressed to deposition rather than to interrogatory form because contention depositions are not permitted in the District of Delaware.

> It has been the consistent position of this Court that a lay person shouldn't be required to formulate a party's contention in response to deposition questioning and that not even a lawyer should be required to formulate trial strategy and contentions in immediate response to questions on deposition. And it has accordingly been the consistent practice to require that contention discovery, which is clearly permissible and very constructive in narrowing the issues, but to confine it to interrogatories to a party, period.

Tiegel Manufacturing Co. v. Globe-Union, Inc., C.A. No. 84-483 (D. Del. 1984), Hearing Transcript at p. 14. (attached as Exhibit A.). *See, also., S.E.C. v. Rosenfeld*, 1997 U.S. Dist. LEXIS 13996 at *6 (S.D.N.Y. 1997) (granting motion for protective order where subject matter of 30(b)(6) deposition "would include disclosure of [] legal and factual theories . . . and other matters constituting attorney work product" and where defendant had shown no reason not to utilize interrogatories appropriate to the stage of discovery).

Dey objects to this topic insofar as it requires expert testimony. Dey further objects to this topic as premature inasmuch as the Court has not construed the meaning of any claim language. Dey also objects to this topic insofar as it calls for Dey to furnish evidence on matters Sepracor must prove to prevail at trial, and thus seeks to shift the burden of proof from Sepracor to Dey.

For the foregoing reasons, Dey will not produce a 30(b)(6) deposition witness in response to this topic.

Topic of Examination No. 3

All facts and circumstances upon which Dey intends to rely to support its contention that each and every asserted claim of '755, '994, '090, '002, and '993 patents is invalid for failure to meet one or more of the requirements of Title 35, United States Code, including Sections 101, 102, 103, and 112 and/or for improper double patenting.

Response to Topic of Examination No. 3

See the General Objections. Dey also objects to this topic of examination as duplicative of Sepracor's other discovery requests. (*See, e.g.,* Sepracor's Interrogatory Nos. 4, 5, 8 and 12).

Dey objects on the basis that this topic of examination improperly seeks to elicit legal conclusions, legal theories, or legal defenses, or otherwise confidential information protected by the doctrine of attorney work product, or the attorney-client privilege. *See, e.g., JPMorgan Chase Bank ex rel. Mahonia Ltd. v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 363 (S.D.N.Y. 2002) (denying plaintiff's request to compel 30(b)(6) responses and holding that its requests for 'facts' were a guise for requesting "mental impressions, conclusions, opinions, and legal theory," which as classic work product, is shielded from discovery under Fed. R. Civ. P 26(b)(3)); *S.E.C. v. Buntrock*, 2004 WL 1470278 at *3 (N.D. Ill. 2004) (holding that the magistrate was correct in finding that what the 30(b)(6) deposition sought "as 'facts' are not merely facts at all, but legal theories and explanation of those theories" and quashing the 30(b)(6) deposition). Dey also objects to this topic of examination as improperly addressed to deposition rather than to interrogatory form because contention depositions are not permitted in the District of Delaware.

> It has been the consistent position of this Court that a lay person shouldn't be required to formulate a party's contention in response to deposition questioning and that not even a lawyer should be required to formulate trial strategy and contentions in immediate response to questions on deposition. And it has accordingly been the consistent practice to require that contention discovery,

> which is clearly permissible and very constructive in narrowing the issues, but to confine it to interrogatories to a party, period.

Tiegel Manufacturing Co. v. Globe-Union, Inc., C.A. No. 84-483 (D. Del. 1984), Hearing Transcript at p. 14. (attached as Exhibit A.). *See, also, S.E.C. v. Rosenfeld*, 1997 U.S. Dist. LEXIS 13996 at *6 (S.D.N.Y. 1997) (granting motion for protective order where subject matter of 30(b)(6) deposition "would include disclosure of [] legal and factual theories . . . and other matters constituting attorney work product" and where defendant had shown no reason not to utilize interrogatories appropriate to the stage of discovery).

Dey objects to this topic insofar as it requires expert testimony. Dey objects to this topic insofar as it requests expert information before the date for providing expert reports. Dey further objects to this topic as premature inasmuch as the Court has not construed the meaning of any claim language.

For the foregoing reasons, Dey will not produce a 30(b)(6) deposition witness in response to this topic.

Topic of Examination No. 4

All facts and circumstances upon which Dey intends to rely to support its contention that Sepracor's case is not exceptional under 35 U.S.C. § 285.

Response to Topic of Examination No. 4

See the General Objections. Dey objects on the basis that this topic of examination improperly seeks to elicit legal conclusions, legal theories, or legal defenses, or otherwise confidential information protected by the doctrine of attorney work product, or the attorney-client privilege. *See, e.g., JPMorgan Chase Bank ex rel. Mahonia Ltd. v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 363 (S.D.N.Y. 2002)(denying plaintiff's request to compel 30(b)(6) responses and holding that its requests for 'facts' were a guise for requesting "mental impressions, conclusions, opinions, and legal theory," which as classic work product, is shielded from

discovery under Fed. R. Civ. P 26(b)(3)); *S.E.C. v. Buntrock*, 2004 WL 1470278 at *3 (N.D. Ill. 2004)(holding that the magistrate was correct in finding that what the 30(b)(6) deposition sought "as 'facts' are not merely facts at all, but legal theories and explanation of those theories" and quashing 30(b)(6) deposition). Dey also objects to this topic of examination as improperly addressed to deposition rather than to interrogatory form because contention depositions are not permitted in the District of Delaware.

> It has been the consistent position of this Court that a lay person shouldn't be required to formulate a party's contention in response to deposition questioning and that not even a lawyer should be required to formulate trial strategy and contentions in immediate response to questions on deposition. And it has accordingly been the consistent practice to require that contention discovery, which is clearly permissible and very constructive in narrowing the issues, but to confine it to interrogatories to a party, period.

Tiegel Manufacturing Co. v. Globe-Union, Inc., C.A. No. 84-483 (D. Del. 1984), Hearing Transcript at p. 14. (attached as Exhibit A.). *See, also, S.E.C. v. Rosenfeld*, 1997 U.S. Dist. LEXIS 13996 at *6 (S.D.N.Y. 1997) (granting motion for protective order where subject matter of 30(b)(6) deposition "would include disclosure of [] legal and factual theories . . . and other matters constituting attorney work product" and where defendant had shown no reason not to utilize interrogatories appropriate to the stage of discovery).

Dey further objects to this topic as premature because Dey's Motion to Strike Plaintiff's Allegations Concerning Willful Infringement is pending.

For the foregoing reasons, Dey will not produce a 30(b)(6) deposition witness in response to this topic.

Topic of Examination No. 5

The existence of any opinions received by Dey or any corporate patent, subsidiaries, affiliates, divisions, predecessors, successors, or any other related entity of Dey prior to making its Paragraph IV Certification in ANDA Nos. 77-800 and 78-309 regarding infringement, validity, and/or enforceability of the '755, '994, '090, '002, and '993 patents, as well as any such opinions obtained by Dey or any corporate parent, subsidiaries, affiliates, divisions,

predecessors, successors, or any other related entity of Dey after the Paragraph IV Certifications were made in these ANDAs.

Response to Topic of Examination No. 5

See the General Objections. Dey further objects to this topic as premature because Dey's Motion to Strike Plaintiff's Allegations Concerning Willful Infringement is pending. Dey objects to the extent this topic calls for information protected by the attorney-client privilege, the attorney work product doctrine, or any other privilege or immunity.

For the foregoing reasons, Dey will not produce a 30(b)(6) deposition witness in response to this topic.

Topic of Examination No. 6

The nature and substance of the opinions expressed in the Notice Letters to Sepracor Inc. regarding ANDA No. 77-800, dated January 9, 2006 and ANDA No. 78-309, dated August 14, 2006.

Response to Topic of Examination No. 6

See the General Objections. Dey objects to topic of examination as vague and ambiguous in that the term "nature" of the opinion is incomprehensible. To the extent Dey understands what is meant by the "substance" of the opinions expressed in the Notice Letters, it is contained within the Notice Letters themselves.

Dey further objects to this topic as premature because Dey's Motion to Strike Plaintiff's Allegations Concerning Willful Infringement is pending. Dey objects to the extent this topic calls for information protected by the attorney-client privilege, the attorney work product doctrine, or any other privilege or immunity.

For the foregoing reasons, Dey will not produce a 30(b)(6) deposition witness in response to this topic.

Topic of Examination No. 7

All facts and circumstances upon which Dey intends to rely to support its contention that it is not properly a party in this action and Sepracor Inc. is not entitled to damages and any such claim is premature.

Response to Topic of Examination No. 7

See the General Objections. Dey objects on the basis that this topic of examination improperly seeks to elicit legal conclusions, legal theories, or legal defenses, or otherwise confidential information protected by the doctrine of attorney work product, or the attorney-client privilege. *See, e.g.*, *JPMorgan Chase Bank ex rel. Mahonia Ltd. v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 363 (S.D.N.Y. 2002)(denying plaintiff's request to compel 30(b)(6) responses and holding that its requests for 'facts' were a guise for requesting "mental impressions, conclusions, opinions, and legal theory," which as classic work product, is shielded from discovery under Fed. R. Civ. P 26(b)(3)); *S.E.C. v. Buntrock*, 2004 WL 1470278 at *3 (N.D. Ill. 2004)(holding that magistrate was correct in finding that what 30(b)(6) deposition sought "as 'facts' are not merely facts at all, but legal theories and explanation of those theories" and quashing 30(b)(6) deposition). Dey also further objects to this topic of examination as improperly addressed to deposition rather than to interrogatory form because contention depositions are not permitted in the District of Delaware.

> It has been the consistent position of this Court that a lay person shouldn't be required to formulate a party's contention in response to deposition questioning and that not even a lawyer should be required to formulate trial strategy and contentions in immediate response to questions on deposition. And it has accordingly been the consistent practice to require that contention discovery, which is clearly permissible and very constructive in narrowing the issues, but to confine it to interrogatories to a party, period.

Tiegel Manufacturing Co. v. Globe-Union, Inc., C.A. No. 84-483 (D. Del. 1984), Hearing Transcript at p. 14. (attached as Exhibit A.). *See, also, S.E.C. v. Rosenfeld*, 1997 U.S. Dist. LEXIS 13996 at *6 (S.D.N.Y. 1997) (granting motion for protective order where subject matter

of 30(b)(6) deposition "would include disclosure of [] legal and factual theories . . . and other matters constituting attorney work product" and where defendant had shown no reason not to utilize interrogatories appropriate to stage of discovery).

For the foregoing reasons, Dey will not produce a 30(b)(6) deposition witness in response to this topic.

Topic of Examination No. 8

All facts and circumstances upon which Dey intends to rely to support its contention that the '755, '994, '090, '002, and '993 patents are unenforceable due to inequitable conduct of Sepracor, its agents, and/or attorneys.

Response to Topic of Examination No. 8

See the General Objections. Dey objects on the basis that this topic of examination improperly seeks to elicit legal conclusions, legal theories, or legal defenses, or otherwise confidential information protected by the doctrine of attorney work product, or the attorney-client privilege. *See, e.g., JPMorgan Chase Bank ex rel. Mahonia Ltd. v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 363 (S.D.N.Y. 2002)(denying plaintiff's request to compel 30(b)(6) responses and holding that its requests for 'facts' were a guise for requesting "mental impressions, conclusions, opinions, and legal theory," which as classic work product, is shielded from discovery under Fed. R. Civ. P 26(b)(3)); *S.E.C. v. Buntrock*, 2004 WL 1470278 at *3 (N.D. Ill. 2004)(holding that the magistrate was correct in finding that what the 30(b)(6) deposition sought "as 'facts' are not merely facts at all, but legal theories and explanation of those theories" and quashing the 30(b)(6) deposition). Dey also further objects to this topic of examination as improperly addressed to deposition rather than to interrogatory form because contention depositions are not permitted in the District of Delaware.

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> contentions in immediate response to questions on deposition. And it has accordingly been the consistent practice to require that contention discovery, which is clearly permissible and very constructive in narrowing the issues, but to confine it to interrogatories to a party, period.

Tiegel Manufacturing Co. v. Globe-Union, Inc., C.A. No. 84-483 (D. Del. 1984), Hearing Transcript at p. 14. (attached as Exhibit A.). *See, also, S.E.C. v. Rosenfeld*, 1997 U.S. Dist. LEXIS 13996 at *6 (S.D.N.Y. 1997) (granting motion for protective order where subject matter of 30(b)(6) deposition "would include disclosure of [] legal and factual theories . . . and other matters constituting attorney work product" and where defendant had shown no reason not to utilize interrogatories appropriate to stage of discovery).

Dey objects to this topic insofar as it requests information requiring expert testimony. Dey further objects to this topic as premature inasmuch as the Court has not construed the meaning of any claim language.

For the foregoing reasons, Dey will not produce a 30(b)(6) deposition witness in response to this topic.

Topic of Examination No. 9

All facts and circumstances upon which Dey intends to rely to support its contention that the '755, '994, '090, '002, and '993 patents are invalid for improper inventorship under 35 U.S.C. § 102(f).

Response to Topic of Examination No. 9

See the General Objections. Dey also objects to this topic of examination as duplicative of Sepracor's other discovery requests. (*See, e.g.,* Sepracor's Interrogatory Nos. 4, 8 and 12).

Dey objects on the basis that this topic of examination improperly seeks to elicit legal conclusions, legal theories, or legal defenses, or otherwise confidential information protected by the doctrine of attorney work product, or the attorney-client privilege. *See, e.g., JPMorgan Chase Bank ex rel. Mahonia Ltd. v. Liberty Mut. Ins. Co.*, 209 F.R.D. 361, 363 (S.D.N.Y. 2002)

(denying plaintiff's request to compel 30(b)(6) responses and holding that its requests for 'facts' were a guise for requesting "mental impressions, conclusions, opinions, and legal theory," which as classic work product, is shielded from discovery under Fed. R. Civ. P 26(b)(3)); *S.E.C. v. Buntrock*, 2004 WL 1470278 at *3 (N.D. Ill. 2004) (holding that the magistrate was correct in finding that what the 30(b)(6) deposition sought "as 'facts' are not merely facts at all, but legal theories and explanation of those theories" and quashing 30(b)(6) deposition). Dey also further objects to this topic of examination as improperly addressed to deposition rather than to interrogatory form because contention depositions are not permitted in the District of Delaware.

> It has been the consistent position of this Court that a lay person shouldn't be required to formulate a party's contention in response to deposition questioning and that not even a lawyer should be required to formulate trial strategy and contentions in immediate response to questions on deposition. And it has accordingly been the consistent practice to require that contention discovery, which is clearly permissible and very constructive in narrowing the issues, but to confine it to interrogatories to a party, period.

Tiegel Manufacturing Co. v. Globe-Union, Inc., C.A. No. 84-483 (D. Del. 1984), Hearing Transcript at p. 14. (attached as Exhibit A.). *See, also, S.E.C. v. Rosenfeld*, 1997 U.S. Dist. LEXIS 13996 at *6 (S.D.N.Y. 1997) (granting motion for protective order where subject matter of 30(b)(6) deposition "would include disclosure of [] legal and factual theories . . . and other matters constituting attorney work product" and where defendant had shown no reason not to utilize interrogatories appropriate to the stage of discovery).

Dey objects to this topic insofar as it requires expert testimony.

For the foregoing reasons, Dey will not produce a 30(b)(6) deposition witness in response to this topic.

Topic of Examination No. 10

All facts and circumstances regarding ANDA Nos. 77-800 and 78-309, including the decision to file the ANDAs to obtain approval to engage in the commercial manufacture, use,

and/or sale of levalbuterol hydrochloride inhalation solutions and levalbuterol hydrochloride inhalation solution concentrate.

Response to Topic of Examination No. 10

See the General Objections. Dey further objects to this topic requesting all facts and circumstances regarding ANDA Nos. 77-800 and 78-309 as overly broad, unduly burdensome, vague and ambiguous. Dey objects to the extent this topic calls for information protected by the attorney-client privilege, work product immunity or any other privilege or immunity. Dey also objects to this topic of examination as duplicative of Sepracor's other discovery requests. (*See, e.g.,* Sepracor's Interrogatory No. 9).

Subject to the foregoing general and specific objections, Dey will designate a witness to testify on Dey's decision to obtain approval to manufacture and sell its levalbuterol ANDA products.

Topic of Examination No. 11

All facts and circumstances regarding any actual evaluations and projections of the market for levalbuterol products, projected sales and pricing of levalbuterol products, the advantages of levalbuterol over racemic albuterol, and the success of levalbuterol in the market in view of the availability of generic racemic albuterol products.

Response to Topic of Examination No. 11

See the General Objections. Dey objects to this topic of examination as overly broad, vague and ambiguous. Dey further objects to this topic as calling for expert testimony. Subject to the foregoing general and specific objections Dey will designate a witness to testify on any evaluations and projections of the market for levalbuterol products and any projected sales and pricing of levalbuterol products.

Topic of Examination No. 12

All facts and circumstances regarding any marketing plan or materials, including all marketing materials for ACCUNEB® racemic albuterol inhalation solutions, including those that refer in any way to levalbuterol, the (R) isomer of albuterol, the (S) isomer of albuterol, and/or

Sepracor's XOPENEX® (levalbuterol hydrochloride) inhalation solutions and/or Sepracor's XOPENEX® (levalbuterol hydrochloride) inhalation solution concentrate, including but not limited to the marketing materials developed by William Isaacs Health Communications and/or NIA Creative.

Response to Topic of Examination No. 12

See the General Objections. Dey objects to this topic as vague and ambiguous in that it does not understand what is meant by "[a]ll facts and circumstances regarding any marketing plan ...." Dey further objects to this topic of examination as overly broad, unduly burdensome in that information relating to ACCUNEB, a different product is neither relevant to any issue in this action nor reasonably calculated to lead to the discovery of admissible evidence. See Fed. R. Civ. P. 26(b)(1).

For the foregoing reasons, Dey will not produce a 30(b)(6) deposition witness in response to this topic.

Topic of Examination No. 13

All facts and circumstances regarding the sales volumes, price, and market share of ACCUNEB® racemic albuterol inhalation solutions for each year since ACCUNEB® was introduced into the market.

Response to Topic of Examination No. 13

See the General Objections. Dey objects to this topic as vague and ambiguous in that it does not understand what is meant by "[a]ll facts and circumstances regarding the sales volumes ...." Dey further objects to this topic of examination as overly broad, unduly burdensome in that information relating to ACCUNEB, a different product is neither relevant to any issue in this action nor reasonably calculated to lead to the discovery of admissible evidence. Dey further objects because Sepracor can obtain this sales information, directly from IMS.

For the foregoing reasons, Dey will not produce a 30(b)(6) deposition witness in response to this topic.

Topic of Examination No. 14

All facts and circumstances regarding the relationship between Dey Inc. and Dey, L.P.

Response to Topic of Examination No. 14

See the General Objections. Dey objects to this topic in that "[a]ll facts and circumstances regarding the relationship..." is vague and ambiguous. Dey further objects to this topic to the extent it calls for information protected by the attorney-client privilege, attorney work product doctrine, or any other privilege or immunity. Subject to these objections, Dey will designate a witness to testify on the facts and circumstances regarding the relationship between Dey Inc. and Dey, L.P.

Topic of Examination No. 15

All facts and circumstances regarding any discussions and/or communications, whether oral or in writing, between Dey and Sepracor concerning levalbuterol.

Response to Topic of Examination No. 15

See the General Objections. Dey objects to this topic of examination as overly broad and unduly burdensome in that it requests "[a]ll facts and circumstances." Dey also objects to this topic insofar as it calls for Dey to furnish evidence that is equally available to Sepracor, or information or documents already in Sepracor's possession.

Subject to the foregoing general and specific objections, Dey will designate a witness to testify regarding any knowledge Dey has of discussions or communications between Sepracor and Dey concerning levalbuterol.

Topic of Examination No. 16

The nature and substance of all searches made by or on behalf of Dey to locate documents and things responsive to Sepracor's Document Requests.

Response to Topic of Examination No. 16

See the General Objections. Dey objects to this topic as vague and ambiguous. Dey does not understand what is meant by the "nature and substance" of searches. Dey objects to this topic to the extent it calls for information protected by the attorney client privilege, the work product doctrine, or any other privilege or immunity. Subject to the foregoing general and specific objections, Dey will designate a witness to testify regarding the procedure followed to locate documents and things responsive to Sepracor's document requests.

ASHBY & GEDDES

/s/ *John G. Day*

Steven J. Balick (I.D. #2114)
John G. Day (I.D. #2403)
Tiffany Geyer Lydon (I.D. #3950)
500 Delaware Avenue, 8th Floor
P.O. Box 1150
Wilmington, DE 19899
(302) 654-1888
sbalick@ashby-geddes.com
jday@ashby-geddes.com
tlydon@ashby-geddes.com

Attorneys for Defendants Dey, L.P. and Dey, Inc.

Of Counsel:

Edgar H. Haug
John S. Goetz
FROMMER, LAWRENCE & HAUG L.L.P.
745 Fifth Avenue
New York, New York 10151
(212) 588-0800

Elizabeth A. Leff
FROMMER, LAWRENCE & HAUG L.L.P.
1667 K Street, N.W.
Washington, D.C. 20006
(202) 292-1530

Dated: April 19, 2007
179846.1

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

TIEGEL MANU CO.,

Plaintiff,

v.

GLOBE-UNION, INC.,

Defendant.

Civil Action No. 84-483

Wilmington, Delaware
October 5, 1984
2:25 o'clock p.m.

BEFORE:

THE HON. WALTER K. STAPLETON, Chief Judge

A P P E A R A N C E S

For Plaintiff:

COLLINS J. SEITZ, JR., ESQUIRE
Connolly, Bove, Lodge & Hutz
FRANK J. BENASUTTI, ESQUIRE
C. FREDERICK KOENIG, III, ESQUIRE

For Defendant:

MARY B. GRAHAM, ESQUIRE
Morris, Nichols, Arsht & Tunnell
GARY CLARK, ESQUIRE [By conference telephone]
JAN WEIR, ESQUIRE [By conference telephone]

[The following occurred in Chambers:]

THE COURT: We are going to have one participant from California whose name is --

MS. GRAHAM: Gary Clark.

MR. SEITZ: Your Honor, if this is a good time for you, I'd like to move to admit Mr. Frank Benasutti and Mr. Fred Koenig from Benasutti & Murray in Philadelphia pro hac vice for this case.

THE COURT: All right. Happy to grant your motion. Welcome back, gentlemen.

MR. BENASUTTI: Thank you, your Honor.

MR. SEITZ: Thank you, your Honor.

[The Court then turned on the telephone conference box.]

THE COURT: Mr. Clark, are you on the line?

MR. CLARK: Yes, your Honor.

THE COURT: Can you hear us all right?

MR. CLARK: Yes, I can.

THE COURT: All right. I believe it is your application.

MR. CLARK: Yes, sir. May I, with permission, your Honor, put you on the speaker phone so I can have my hands free?

THE COURT: Certainly.

MR. CLARK: Thank you.

Your Honor, I have with me here in the office Jan Weir, an associate in our firm, who is of record in the case.

Your Honor, we brought this motion because we think that the nature of the discovery that they have sought is more properly conducted by interrogatories.

When we received the notice, I called personally Mr. Volpe, of Mr. Benasutti's firm, and explained the situation to him and suggested that we would be very willing to answer interrogatories directed to essentially the same subject. He said he'd get back to me the next day. When he did, he said discovery by interrogatory wasn't acceptable because they needed the discovery before the preliminary injunction hearing.

I then offered to turn interrogatory answers around in very short order, within a matter of days, so that he would have them before the preliminary injunction hearing, but I was told that that solution wasn't acceptable, which was rejected out of hand without an explanation.

We are now told that the discovery that they need is urgent for the preliminary injunction hearing. I don't think that this argument can be taken very seriously.

Your Honor may recall that they were originally prepared to have their preliminary injunction motion heard within one week's time and in such short order that they obviously did not leave any time for discovery before it could be heard, and when they were taking that position, they had our answer in hand and they knew what our denials were. So the position they are taking now that there are denials in the answer which raise new matters necessary to be explored on discovery before the preliminary injunction hearing I think simply is not well taken.

I would also note, in connection with their argument, that this is designed to elicit discovery for preliminary injunction, that the deposition notice very mechanically lists each and every denial of our answer to the complaint as an area of inquiry on deposition, without any apparent regard to the relevance of each and every point to their motion.

Category No. 3 is a prime example. They want to know the basis upon which we first sued Tiegel in Los Angeles asserting venue over them there, but that has no relevance to the preliminary injunction motion. And, more than that, it has already been the subject of briefs, affidavits, and a hearing in Los Angeles.

So they are certainly well aware of our

position in that regard and do not need the discovery before the preliminary injunction hearing on an issue such as that.

We think that there would also be substantial prejudice to Globe-Union from having to give an oral deposition on the subjects of the bases for our denials in the answer, particularly in the time frame in which they want to take the deposition.

We have made the point that the answer is outside counsel's work product. Outside counsel is uniquely qualified to state the basis for each denial. Those denials obviously require an application by counsel of law as facts based upon the facts as counsel understand them, which is a far different thing from getting discovery of merely underlying facts after interrogatories have identified the factual basis and the witnesses and documents that can support them.

So we think that the deposition creates a risk of undue waiver of privilege and work product and that it would be more appropriate for them to take it by interrogatory.

I would also like to make the point that the deposition comes at a time that could not be more disruptive for both parties. During the week that they have noticed the deposition to take place we have had to spend substantial

time preparing our reply brief on the transfer motion that is before your Honor. Today we are filing an opposition to a stay motion that they had on file in San Francisco in connection with that action. On Monday, we have due our opposition to the preliminary injunction motion. And on Tuesday or Wednesday we have an extensive status report due in San Francisco for Judge Schwartzer.

They have an answer due to our amended complaint in San Francisco on Monday or Tuesday. They have answers due to our interrogatories and document production requests in San Francisco due on Tuesday or Wednesday of next week. They have to put together a reply to our preliminary injunction motion, and they have to assist us in putting together the joint status report next week for Judge Schwartzer.

So it seems to me that there are so many things going on that we can't possibly also squeeze a deposition in.

In that regard, I'd like to conclude my remarks by saying that it is unique in my experience that counsel will file a motion such as this motion for preliminar injunction, seek a hearing in very short order, and then get their memo and supporting affidavits on file, and then come to the Court and take the position that the motion isn't adequately supported without additional discovery, discovery

which would only take place now after our opposition to their motion is in.

It seems to me that the more appropriate relief that they should be getting here is a postponement of their preliminary injunction motion so that all parties can have adequate time and we of course can have an adequate opportunity to respond in writing to whatever facts they think they might uncover in discovery and utilize in supporting their preliminary injunction motion.

Thank you.

THE COURT: All right. Is it Tiegel -- is that the way your client's name is pronounced?

MR. BENASUTTI: Yes, your Honor.

THE COURT: Who wants to speak on behalf of Tiegel?

MR. BENASUTTI: I will, your Honor.

I have a great deal of difficulty with recounting of all of those facts. I think the record will show that at least the one that seemed to be most important to them is that we filed the motion before their answer came in in this case. We filed the motion because our client in my belief is being grievously injured, right at this very moment --

MR. CLARK: Your Honor, I'm afraid we can't hear at this end.

THE COURT: All right. Do you want to speak up, Mr. Benasutti?

MR. BENASUTTI: I believe that we are being grievously injured by --

MR. CLARK: Hello --

THE COURT: Do you want to speak up?

MR. BENASUTTI: We're trying to speak up, but if you make any noise on the other end, the problem is that these boxes cut out the voice.

MR. CLARK: I understand that. We have not been making any noise, but we haven't been able to hear anything for about the last 30 or 45 seconds.

MR. BENASUTTI: All right. I am wondering if I could pick up a telephone and talk into that and then talk to the Court. In that way I wouldn't have to shout at the Court. Is that possible?

[The Court then moved the telephone conference box.]

MR. BENASUTTI: Can you hear me now?

MR. CLARK: Yes, I can.

MR. BENASUTTI: All right. They moved the speaker a little closer. I'll start from the beginning.

First of all, we didn't have their answer, your Honor, when we filed our motion for a preliminary injunction. We brought this suit to stop them from suing us

and to stop them from suing our customers, which is something they are doing right now, and therefore we want action right now, and I think we are entitled to that action as quick as possible. So we brought the motion.

We then got their answer. Now, in the answer they have made denials. The denials are to the very same things that we brought the motion on. We brought the motion on the complaint, on the substance of the complaint. If they have made denials, the usual course of discovery is to take depositions to find out what the substance of those denials is, what are the facts.

Counsel just mentioned that he has a factual basis from which lawyers raise legal conclusions. We are entitled to the facts of those things. The fact of the matter is, interrogatories are generally used to identify people and to identify things or documents, which you then go through when you get document discovery, and then down the line you start taking depositions. We want to avoid all that. We want to avoid all this lawsuit. All we are saying is, if you have facts that you are going to bring to this Court's attention at next Monday's hearing, we have a right now to find out what they are because we are out front with what our position is and they have no business covering up what their position is.

The purpose of this motion, as I see it, is

simply to keep us from getting those facts before the hearing. If that is true, then it is simply a motion interposed for delay because they have indicated in their motion that they are going to supply us with all the answers we need.

All we have to do is ask every conceivable question in the world and they are going to be able to answer it by the end of next week, from what I hear now. That is the first time, incidentally, that we have heard that, but let's assume that it is true.

They are going to answer every question, and every question has to be based on everything we know now. In other words, we find out a fact and I guess we'd have to write them another question, and then if we find another fact, then we'd have to write them another question. It is an impossible proceeding to get done.

The way to handle that is, you bring in a witness and you have him testify. Unfortunately, a lot of attorneys -- and it is all of our fault -- consider that the Federal Rules are an apple that you can take one bite out of before they get stopped.

I would submit to this Court that this client has already had their one bite this year. In the co-pending case that I mentioned in my papers, involving two of the same patents that are in suit, which is pending

now in the Southern District of Indiana, there was an Order entered by Judge Sarah Evans Barker earlier this year requiring them to comply with Rule 30[b][6] and to provide a witness and to prepare that witness to fully and completely answer questions posed at a deposition. And the Judge went on to say, "Further, Johnson is now deemed on notice as to the specific areas in which the defendants will be making discovery inquiries when the deposition is rescheduled." She said that the Court views their past conduct in this matter to be such as to warrant a further reminder of the sanctions available for the abuse of discovery proceedings.

Here they are again with the same kind of tactic. They are not going to produce a witness. The only witness is -- if you look at all the different papers that have been filed, the only place you will see a witness appear is on paper -- it is as mysterious as it is ubiquitous, because every time a paper is filed here, well, the witness is over here. If you file a paper out there, well, the witness is over there. The latest paper they filed they don't even identify the witness and then say to the Court, "Pay for him to come to the deposition." We don't know if he is here in Wilmington. We don't know who he is.

The purpose of 30[b][6] and the purpose of

laying out, as my colleague, Mr. Koenig did in a very detailed and narrow attachment to notice a deposition, is saying, this is the specific question or the specific issue that we want to talk to that witness about.

This is not a broad general 30[b][6] covering every aspect of the litigation. We want to go down the little areas where they have made denials of specific things that we have raised, and I think we are entitled to do that, and I certainly hope that the Court would want to have answers to that sort of thing at the time that the Court is ready to rule on a motion for preliminary injunction.

A motion for a preliminary injunction is not like a TRO. We are not coming in here and taking a swat at it. We are saying that they should be put out of business on this lawsuit by laches and estoppel, and they are saying that their conduct up to now doesn't warrant that, and I think we are entitled to investigate into what the basis for that is.

Now, we laid out in our brief in support of our motion for preliminary injunction a very detailed statement of each and every paper that we are relying on to support our motion. We said, On such and such a date so-and-so wrote so-and-so, and that sort of thing. And I think we are entitled to see what their position is before we go to

Court.

THE COURT: All right. Mr. Clark?

MR. CLARK: Yes, your Honor. We're not trying to deny them access to the underlying facts of which they are speaking. In fact, that is the reason we offered to answer interrogatories. That offer was specifically made by me to Mr. Volpe, who I understand is not there, unfortunately, and it was rejected. To think that we are now going to go ahead on a preliminary injunction motion and try to conceal from the Court the basis for our denials to their answer -- or denying the relief they have asked for in the preliminary injunction motion is really untenable.

Our opposition to that motion is due on Monday. We have prepared affidavits, exhibits, and of course our legal memorandum in opposition to that motion. It will be filed on Monday, and counsel at that point, as is proper under the local rules of the Court, will be apprised of everything upon which we rely in opposition to the preliminary injunction motion.

So it is not the fact that he is going to go into the hearing on the preliminary injunction motion on Monday naked, totally unadvised of the basis of our denial.

THE COURT: Does anybody else want to say anything?

[No response.]

THE COURT: I view the noticed discovery as being contention discovery. It has been the consistent position of this Court that a lay person shouldn't be required to formulate a party's contention in response to deposition questioning and that not even a lawyer should be required to formulate trial strategy and contentions in immediate response to questions on deposition. And it has accordingly been the consistent practice to require that contention discovery, which is clearly permissible and very constructive in narrowing the issues, but to confine it to interrogatories to a party, period.

Now, we appear to have a time problem here, although I am not sure whether we have a time problem or not. When did you say you are prepared -- what did you say your turnaround time on interrogatories would be, Mr. Clark?

MR. CLARK: Your Honor, of course it would depend on the number and the scope of them, but I think that within a matter of -- if they were served on us, for instance, on Monday, I think by Thursday or Friday we could probably have answers for them, assuming that they are of a scope limited to the issues raised on preliminary injunction.

MR. BENASUTTI: Your Honor, I might just add one thing to this, and I think I covered it in my papers,

but as I understand what he is saying is -- and you mentioned the word "lay person", and I would agree with you as to the lay person -- I was asking a lay person only for factual positions. For example, their Mr. Burkhart and other people who took affidavits had factual contentions, and it is those things I think that I was entitled to.

But if their contention is that outside counsel is in the possession -- and on page 9 of their brief they say that he is in possession of all the information with respect to what their positions are, including what was in their mind when they did certain acts, then it seems to me I am entitled to take the deposition and in fact call as a witness whatever counsel that was, because I think that when you set up the mind of counsel as being your defense -- you know, it is just like an advice of counsel defense; when you put up an advice of counsel defense, you are entitled to get all of the attorney-client privilege documents and take that counsel's deposition.

So I think there are maybe two questions, if we bifurcate this thing. First of all, if they have facts that they are relying on, then a fact witness should be provided. But if they are saying that it is contentions of counsel just on legal issues, that is one thing, but if it is legal advice that they are hiding behind, then I think

that we are entitled to take his deposition, or even call him as a witness at our preliminary injunction hearing.

THE COURT: Let me express what I assume was implicit, and that is, I'm not ruling on anything other than the discovery that has been proposed and which is the subject of the protective order. It well may be that Tiegel has the right to take the deposition of one or more lawyers. There are cases and issues where it is appropriate to take the deposition of lawyers as fact witnesses. I am not taking any position with respect to anything other than the protective order that is before me, and I am telling you that as far as the subject matter as currently cast in the notice of deposition, it is cast in my opinion as contention discovery, and if you want to ask those kinds of questions, I'm going to require that you do it by interrogatory. And I think certainly, under the circumstances, an offer to provide responses in three or four days seems to me to be a reasonable undertaking. If that means you want to move back the current argument date on your application for a preliminary injunction, I certainly will be happy to consider that.

MR. BENASUTTI: We want to go ahead with that.

THE COURT: Okay.

MR. BENASUTTI: My only position would have

been that we really -- the use of the word "basis" I guess is what seems to be troubling the Court, and what we wanted was the factual basis. We don't care about their contentions. They are already set out in their answer. We know what their contentions are. I don't really have too much to ask him in that regard. His contention is he didn't do it, but I want to know what the basis for that is, and that means, what is the factual basis for it. If you interpret the word "basis" to mean "contention", I already know what it is. He says -- his contention is that he denies the allegation. He contends that he didn't do it. So I was using the word "basis" in this context, and I would limit it in any deposition that I got to factual basis, not legal contention. I am not interested in his legal contentions. They are already a matter of record.

So I would again say to the Court, if we want to file interrogatories as to legal contentions, maybe we can think of some, but that certainly wasn't our object in preparing this notice of deposition to use the word "basis" to mean "contention". Basis meant basis in fact.

In fact, I think the notice says that somebody is going to testify as to facts. I think it says that, testify as to facts.

THE COURT: Well, if contention

interrogatories are filed on Monday, I will require a response by service -- I am talking on the other side -- by 5:00 o'clock on Thursday. If fact discovery is noticed, I will look at it and we will see whether it is appropriate or not appropriate. And we will keep the 5:00 o'clock Monday, October 15 time for presentation of both the motion for a preliminary injunction and the transfer motion. Is that right?

[Counsel indicate in the affirmative.]

THE COURT: All right. Thank you.

MR. CLARK: Your Honor --

THE COURT: Yes. Is there anything else we can profitably address?

MR. CLARK: Your Honor, in connection with your Order allowing them to serve interrogatories, could it require that their service of them be in such a manner that it gets it in the hands of all counsel on Globe-Union's side of the case on Monday, including the house counsel in [redacted] who is listed -- I guess he is not listed on [redacted], but I can provide that identity to counsel for Tiegel.

MR. BENASUTTI: I wonder if we could have the identity of this witness who is going to testify on your behalf, the one that is mentioned in your brief. Could we have the identity of that person?

THE COURT: Could you hear that?

MR. CLARK: I didn't, your Honor.

MR. BENASUTTI: I wonder if we could have the identity of the person listed --

MR. CLARK: Joseph Gofman. He's on the pleadings of the San Francisco action.

MR. BENASUTTI: Excuse me. You didn't let me finish the question. I know he is your in-house counsel in Milwaukee, along with John Ryan. I wonder if we could have the identity of the person who is otherwise unidentified in your brief who is going to testify with respect to the matters raised by our motion for a preliminary injunction.

THE COURT: I am not sure I understood the question.

MR. BENASUTTI: The question is, your Honor, that they mention in their motion for a protective order that they would have to bring a certain witness in to testify in response to 30[b][6], and I want to know who that person is because, as your Honor has indicated, we could make application to take fact information from that person, and I'd like to know who he is and where he is, because we might want to take his deposition in the meantime as to the facts.

THE COURT: I don't think you can ask somebody to designate a 30[b] witness when you don't know

what the subject matter is. So when you -- pardon me; if you can't hear, please sing out, Mr. Clark.

MR. CLARK: All right, I will. We didn't hear the last bit.

THE COURT: What I said was that it turns out that Mr. Benasutti was asking you to designate your 30[b] witness as to a hypothetical deposition that he is considering taking apparently in some fact areas, and I told him that I didn't think I could in fairness require you to designate a witness until such time as the fact area to be explored in such a deposition was identified.

MR. BENASUTTI: I guess I made myself unclear and I apologize to the Court. I was asking for the identity of the witness which they mentioned in their brief. They mentioned a witness. All I want is the identity of the person they had in mind, not the identifying of somebody who is hypothetical. This is a person that they mentioned in their brief as being in existence. And all I'd like to know is who he is or she or them.

THE COURT: There isn't going to be the deposition that is the subject matter of these papers, and I don't want to spend time discussing something that is not going to come to pass.

Is there anything else we can profitably discuss?

MR. CLARK: No, your Honor, I think not.

THE COURT: Okay. Thank you.

MR. CLARK: Thank you.

MR. BENASUTTI: Thank you, your Honor.

[Hearing concluded.]

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